No. 87-1745

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTH CENTRAL UNITED FOOD & COMMERCIAL WORKERS UNIONS & EMPLOYERS HEALTH & WELFARE TRUST and RAY B. WOOSTER,

Petitioners,

v.

C & G MARKETS, INC. and DONALD L. CHILDRESS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit properly allow an employer to offset premiums mistakenly overpaid to a multiemployer plan trust against unpaid premiums in an action initiated by the trust under ERISA for recovery of delinquent payments?

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BRIEF IN OPPOSITION

Respondents C & G Markets, Inc., and Donald L. Childress file this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause.

COUNTERSTATEMENT OF THE CASE

C & G Markets, Inc. ("C & G"), was a Texas corporation until it was dissolved in 1984. Donald L. Childress ("Mr. Childress") was president and sole shareholder of C & G and this action proceeds against him individually.

South Central United Food and Commercial Workers Unions and Employers Health and Welfare Trust ("South Central") is a multiemployer qualified plan and an employee benefit plan as defined by section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3) (1982). South Central is administered by a board of trustees composed equally of representatives of the United Food and Commercial Workers Union (the "union") and of employers. Ray B. Wooster, a party to this litigation, acted as a fiduciary and trustee of South Central. South Central provides health and welfare benefits to employees in accordance with collective bargaining agreements between employers and the union.

C & G was a party to a collective bargaining agreement with the union from June 1, 1980, through May 29, 1983, under which benefits were provided through South Central to certain nonprobationary C & G employees. C & G consistently contributed premiums to the South Central on behalf of covered employees during the term of the agreement.

In June 1983 the union was decertified by a vote of the bargaining unit at C & G and, as a result, C & G was no longer obligated to make contributions to South Central.

A South Central audit released in May 1983 disclosed that C & G had overpaid $26,649.99 in contributions on behalf of probationary employees during 1981-83; an additional $750.11 overpayment was disclosed on a revised South Central audit report in March 1986. Because these contributions were made by mistake, Mr. Childress requested a credit. However, Ray B. Wooster, the South Central plan administrator, never presented this refund claim to the South Central trustees but instead filed suit against C & G and Mr. Childress. South Central instituted this action in the United States District Court for the Southern District of Texas,

Galveston Division, for recovery of contributions allegedly owed by C & G. C & G counterclaimed for recovery of mistaken contributions.

The central dispute was whether C & G probationary employees were entitled to insurance coverage under the collective bargaining agreement. South Central contended probationary employees were covered and, in support of this position, provided benefits to C & G probationary employees and sought more than $12,000.00 in "delinquent" premiums. C & G contended probationary employees were not entitled to benefits and sought a credit against premiums due for regular employees for over $29,000.00 in premiums erroneously submitted for employees not covered through South Central.

The district court determined that the parties' collective bargaining agreement did not require C & G's contribution of insurance premiums to South Central for probationary employees and that contributions by C & G on their behalf were made by mistake. *South Central United Food & Commercial Workers Unions & Employers Health & Welfare Trust v. C & G Markets,* No. G-84-203, slip op.at 2-3 (S.D. Tex. Sept. 17, 1986). South Central did not appeal these findings.

The district court also found that Mr. Childress had timely requested reimbursement of these contributions but that the South Central plan administrator had never presented the refund claim to the South Central trustees. *Id.* at 3. South Central did not appeal these findings.

On appeal to the Fifth Circuit, South Central challenged C & G's right to an action or setoff under section 403(c)(2) of ERISA, 29 U.S.C. § 1103(c)(2) (1982), or under federal common law.

The Fifth Circuit expressly declined to address the issue of whether ERISA provides a private right of action to an employer seeking to recover mistakenly overpaid contributions. *South Central United Food & Commercial Workers Unions v. C & G Markets, Inc.*, 836 F.2d 221, 224 (5th Cir. 1988). The court distinguished that issue from the issue presented here, *i.e.*, whether an employer is entitled to counterclaim a setoff for contributions mistakenly made against underpaid contributions in an action originated by the plan trustee against an employer and emphasized the limited extent of its holding:

> While we tend to agree that ERISA does not provide a private right of action to an employer seeking to recover mistakenly overpaid contributions, we do not feel the need to address an issue which has already split the Circuits.
>
> . . . We wish to make it absolutely clear that we are not establishing any affirmative right of action in favor of the employer under ERISA.

Id. at 224-25 (footnote omitted).

The Fifth Circuit affirmed that "[i]n this limited situation . . . there is a right to offset mistakenly overpaid contributions against a delinquency owed." *Id.* at 225.

The court disagreed, however, with the district court's permitting a front-end offset, calculation of interest and awards of attorneys' and auditors' fees. These remaining issues are currently on remand and under review in the district court and consideration by this Court has not been sought by petitioners.

Following the issuance of the mandate by the Fifth Circuit, South Central filed a motion for award of attorney fees which is currently pending in the Fifth Circuit.

Thus, various aspects of this case are currently under consideration by this Court as well as by the Fifth Circuit and by the district court.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because: (1) the decision of the Fifth Circuit is correct and consistent with statutory authority and the law of other circuits; (2) various issues in the case are currently pending in both the Fifth Circuit and the district court, and consideration by this Court at this time is inappropriate; and (3) this Court has previously denied petitions for writs of certiorari in cases presenting the issues requested for review.

ARGUMENT

The Fifth Circuit specifically noted the issue petitioners cite as creating a conflict with decisions of other circuits but repeatedly declined to decide this case by addressing that issue. For example, the court stated: "[w]hile we tend to agree that ERISA does not provide a private right of action to an employer seeking to recover mistakenly overpaid contributions, *we do not feel the need to address an issue which has already split the Circuits," South Central United Food & Commercial Workers Union v. C & G Markets, Inc.*, 836 F.2d 221, 224 (5th Cir. 1988) (emphasis added), and later noted: "[w]e wish to make it absolutely clear that we are not establishing any affirmative right of action in favor of the employer under ERISA. We are simply applying ERISA to permit a refund of mistakenly overpaid contributions." *Id.* at 225.

The Fifth Circuit found that it was not necessary for it or the district court to find an implied right of action in favor of the employer under ERISA because ERISA expressly provides recovery. *Id.* at 224.

Section 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1102(c)(2)(A)(ii) (1982), provides that contributions "made by an employer to a multiemployer plan by a mistake of fact or law" may be returned to the employer.

The trial court found that the collective bargaining agreement did not require contributions on behalf of probationary employees for health and welfare benefits provided through South Central and that contributions made by C & G on behalf of these employees were made by mistake. *South Central United Food & Commercial Workers Unions & Employers Health & Welfare Trust v. C & G Markets*, No. G-84-203, slip op. at 2-3 (S.D. Tex. Sept. 17, 1986). The parties do not dispute this finding.

The trial court further found that Mr. Childress timely sought a refund of these contributions and that the request was never put before the trustees by the plan administrator. *Id.* at 3. The parties do not dispute this finding.

Petitioners here concede that:

> As amended, section 403(c)(2)(A)(ii) is limited to multiemployer plans, such as South Central, which are required to maintain a Board of Trustees composed equally of employer representatives and representatives of labor. 29 U.S.C. § 186(c)(5). An employer who has made legitimately mistaken contributions can always expect that at least one-half of the votes on the Board of Trustees will likely support return of mistaken contributions, if that can be reconciled with their fiduciary duties.

Petition for writ of certiorari at 10. There has been no claim by South Central that return of the mistaken contributions was inconsistent with any fiduciary duties of the trustees. This statutory scheme is thwarted if the plan administrator fails or refuses to communicate to the board of trustees an employer's request for return of mistaken contributions. This is exactly the circumstance presented in this case.

Although the Fifth Circuit allowed a counterclaim for mistaken contributions, the court ordered that delinquent payments be calculated independently and interest and penalties be calculated before any offset. Thus, South Central is not penalized in its collection of delinquent payments through the decision. 836 F.2d at 225.

This Court has previously denied petitions for writs of certiorari in cases involving mistakenly paid contributions. *Whitworth Bros. Storage Co. v. Central States, S.E. & S.W. Areas Pension Fund*, 794 F.2d 221 (6th Cir.), *cert. denied*, 107 S. Ct. 645 (1986); *Award Service, Inc. v. Northern California Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986).

CONCLUSION

For the foregoing reasons, respondents respectfully request and suggest that the petition for writ of certiorari be denied.

Respectfully submitted,

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